Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor and other appeals (No 4)

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05(L)-289–12 OF 2021, 05(L)-290–12 OF 2021 AND 05(L)-291–12 OF 2021

TENGKU MAIMUN CHIEF JUSTICE, ABANG ISKANDAR CJ (SABAH AND SARAWAK), NALLINI PATHMANATHAN, MARY LIM AND MOHAMAD ZABIDIN FCJJ

16 AUGUST 2022

Criminal Procedure — Appeal — Adjournment — Parties to Federal Court criminal appeal were informed in April that the appeal was fixed for hearing over several days in August — Appellant changed his solicitors/counsel in late July — Written request by new solicitors for adjournment of hearing dates was refused — On hearing date of appeal, new counsel again requested for adjournment of three to four months to prepare appeal arguments — Whether r 6(a) of Legal Profession (Practice and Etiquette) Rules 1978 prohibited lawyers from accepting brief if they could not appear and represent client on required day — Whether appellant had right to change his lawyers at any time but could not do so at expense of Court, prosecution and justice system — Whether vacating of pre-fixed hearing dates not only wasted public funds but denied justice to other appellants who were waiting for their appeals to be heard

During case management held on 8 April 2022 in the presence of the parties, the Federal Court had fixed the instant three appeals to be heard over a total of nine days from 15 to 19 August 2022 and again from 23 to 26 August 2022. The appeals were against the appellant's conviction and sentence by the High Court on seven criminal charges. On 26 July 2022, the Federal Court Registry was informed that the appellant had changed his lawyers. In their letter to the court, the new solicitors requested for an adjournment of the hearing dates but this was rejected. The appeal hearing did not proceed on the 15 August as scheduled because the appellant had filed motions to adduce fresh/additional evidence. The court had to deal with these motions first and, after deliberation, unanimously dismissed them the following day immediately after which the parties were instructed to proceed to make their submissions on the three appeals. At that juncture, the appellant's new counsel prayed for an adjournment of 'three to four months' since he and his team had newly taken over conduct of the matter and required time to prepare to argue the appeals.

Held, unanimously refusing the adjournment application:

(1) Although the courts had absolute discretion to grant or refuse adjournments, such discretion had to be exercised judiciously. What was judicious hinged on a proper and wholesome consideration of the facts and circumstances of the case before making a decision (see para 13).

(2) In appropriate cases, where counsel was not ready to proceed for legitimate reasons, the court should be minded to adjourn a cause or matter. But that was not the case here. All parties, including the appellant, were well aware since April 2022 that the appeals had been fixed for hearing from 15 to 26 August 2022 and that a previous request for adjournment on the same ground had been refused (see paras 16–17).

(3) Rule 6(a) of the Legal Profession (Practice and Etiquette) Rules 1978 provided that an advocate and solicitor shall not accept any brief unless he was reasonably certain of being able to appear and represent the client on the required day. The said 1978 Rules appeared to recognise the general disposition of the courts in this country not to favour adjournments unless cogent reasons were provided. The general rule was that counsel shall make every effort to be ready for trial (and, by extension, for the hearing of appeals) on the day fixed for hearing (see paras 18–19).

(4) The appellant, although well aware of the dates fixed for hearing of the appeals, elected to change his solicitors and appoint a new counsel. It was his right to do so but he could not, after having made that decision, say that his new lawyers were not ready to proceed with the hearing of the appeals. Similarly, the newly-appointed lawyers were not entitled to say that they needed more time to prepare, knowing full well that the hearing dates had been fixed well in advance. In the circumstances, the request for adjournment and the grounds in support thereof were neither cogent nor reasonable (see paras 21–22).

(5) Considerable public funds would be wasted if granting an adjournment in a case of this kind was an easier option. Article 8 of the Federal Constitution and the Rule of Law demanded that the appellant be treated just like any other accused. As such, whilst the appellant was entitled to change his counsel, he was not entitled to make that choice at the expense of the court, the prosecution or the entire justice system (see para 24).

(6) A very significant component of the right to a fair trial was that justice would not be unduly delayed. The Chief Justice's Practice Direction No 2/2003 stated that cases of this nature had to be prioritised. The time taken on this case, especially the number of days fixed for hearing, meant many other criminal cases and accused persons had to wait their turn for their appeals to be heard. Justice delayed in this case was justice denied to other accused persons (see paras 25–26).

[Bahasa Malaysia summary

Semasa pengurusan kes pada 8 April 2022 dengan kehadiran pihak-pihak, Mahkamah Persekutuan telah menetapkan tiga rayuan ini untuk didengar selama sembilan hari bermula 15–19 Ogos 2022 dan 23–26 Ogos 2022. Rayuan-rayuan tersebut adalah untuk sabitan dan hukuman perayu oleh Mahkamah Tinggi atas tujuh pertuduhan jenayah. Pada 26 Julai 2022, Pejabat Pendaftar Mahkamah Persekutuan dimaklumkan bahawa perayu telah menukar peguamnya. Dalam surat mereka kepada mahkamah, peguambela baru tersebut memohon penangguhan tarikh pendengaran tetapi ditolak. Pendengaran rayuan tidak diteruskan pada 15 Ogos seperti yang dijadualkan kerana perayu telah memfailkan usul untuk menambah keterangan baharu/tambahan. Mahkamah terpaksa memutuskan usul-usul ini terlebih dahulu dan, selepas meneliti usul-usul tersebut, sebulat suara menolaknya pada hari berikutnya sebaik sahaja pihak-pihak diarahkan untuk meneruskan penghujahan mereka di dalam ketiga-tiga rayuan tersebut. Pada ketika itu, peguambela perayu yang baru memohon penangguhan 'tiga hingga empat bulan' kerana beliau dan pasukannya baru sahaja mengambil alih kes tersebut dan memerlukan masa untuk bersedia untuk berhujah dalam rayuan tersebut.

Diputuskan, sebulat suara menolak permohonan penangguhan:

(1) Walaupun mahkamah mempunyai budi bicara mutlak untuk membenarkan atau menolak penangguhan, budi bicara tersebut perlu dilaksanakan dengan bijaksana. Perkara tersebut bergantung pada pertimbangan yang betul terhadap fakta dan keadaan kes sebelum membuat keputusan tersebut (lihat perenggan 13).

(2) Dalam kes-kes yang sesuai, apabila peguam tidak bersedia untuk meneruskan kes tersebut atas sebab-sebab yang sahih, mahkamah harus munasabah untuk menangguhkan kes tersebut. Tetapi perkara tersebut tidak berlaku di sini. Semua pihak, termasuk perayu, sedia maklum sejak April 2022 bahawa rayuan telah ditetapkan untuk pendengaran dari 15 hingga 26 Ogos 2022 dan permohonan penangguhan sebelum ini atas alasan yang sama telah ditolak (lihat perenggan 16–17).

(3) Peraturan 6(a) Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Etika) 1978 memperuntukkan bahawa peguam bela dan peguam cara tidak boleh menerima sebarang tugasan melainkan sekiranya dia secara munasabah yakin dapat mewakili anakguam pada hari perbicaraan. Kaedah-Kaedah 1978 mengambil maklum prinsip umum mahkamah di negara ini ketika pelupusan prosiding kes untuk tidak memihak kepada penangguhan melainkan alasan munasabah diberikan. Prinsip umumnya adalah peguambela hendaklah berusaha sedaya upaya bersedia untuk perbicaraan (dan untuk pendengaran rayuan) pada hari yang ditetapkan untuk pendengaran (lihat perenggan 18–19).

(4) Perayu, walaupun mengetahui tarikh-tarikh yang ditetapkan untuk pendengaran rayuan tersebut, memilih untuk menukar peguam belanya dan melantik peguam baharu. Perayu mempunyai hak untuk berbuat demikian tetapi dia tidak boleh, selepas membuat keputusan itu, mengatakan bahawa peguam barunya tidak bersedia untuk meneruskan pendengaran rayuan tersebut. Begitu juga, peguam yang baru dilantik tidak berhak mengatakan bahawa mereka memerlukan lebih banyak masa untuk bersedia, mengetahui sepenuhnya bahawa tarikh pendengaran telah ditetapkan. Dalam keadaan ini, permintaan untuk penangguhan dan alasan untuk menyokongnya tidak munasabah (lihat perenggan 21–22).

(5) Dana awam yang besar akan dibazirkan sekiranya penangguhan dibenarkan dalam kes seperti ini. Perkara 8 Perlembagaan Persekutuan dan Kedaulatan Undang-Undang menuntut agar perayu dilayan samarata seperti tertuduh lain. Oleh itu, walaupun perayu berhak menukar peguamnya, beliau tidak berhak membuat pilihan tersebut dengan membazirkan masa mahkamah, pendakwaan atau keseluruhan sistem keadilan (lihat perenggan 24).

(6) Perkara yang sangat penting yang melibatkan hak untuk perbicaraan yang adil adalah bahawa keadilan tidak boleh ditangguhkan secara tidak wajar. Arahan Amalan Ketua Hakim Negara No 2/2003 menyatakan bahawa kes-kes seperti ini perlu diutamakan. Masa yang diambil untuk kes ini, terutamanya bilangan hari yang ditetapkan untuk pendengaran, bermakna banyak kes jenayah lain dan orang yang dituduh terpaksa menunggu giliran mereka untuk rayuan mereka didengar. Keadilan yang dilewatkan di dalam kes ini ialah keadilan yang dinafikan kepada tertuduh lain (lihat perenggan 25–26).]

Cases referred to

Lai Cheng Chong v PP [1993] 3 MLJ 147, HC (refd)
PP v Mohtar bin Abdul Latiff [1980] 2 MLJ 51 (refd)
Yahya Hussein Mohsen Abdulrab v PP [2021] 5 MLJ 811, FC (refd)

Legislation referred to

Federal Constitution arts 5(1), (3), 8
Legal Profession (Practice and Etiquette) Rules 1978 rr 6(a), 24(a), (b)

Hisyam bin Abdullah @ Teh Poh Teik (with Mohd Zaid Ibrahim, Liew Teck Huat, Rueben Mathiavaranam, Hannah Kam Zhen Yi, Kee Wei Lon, Low Wei Loke and Ong Kang Nyong) (Zaid Ibrahim Suflan TH Liew & Partners) for the appelllant.
V Sithambaram (with Donald Joseph Franklin, Sulaiman Kho Kheng Fuei, Mohd Ashrof Adrin Kamarul and Manjira Vasudevan) (Attorney General's Chambers).

Tiu Foo Woei (Azri, Lee Swee Seng & Co) watching brief for Bar Council.

Tengku Maimun Chief Justice, Abang Iskandar CJ (Sabah and Sarawak), Nallini Pathmanathan, Mary Lim and Mohamad Zabidin FCJJ:

APPLICATION FOR ADJOURNMENT

INTRODUCTION

[1] Having dismissed the motions to adduce additional evidence, we directed parties to proceed with the appeals. Learned counsel for the appellant, Tuan Hj Hisyam Teh, however moves to adjourn the hearing of the appeals to a later date in three to four months. The basis of his application for adjournment is that he and his team only recently took over and that the appeals — spanning tens of thousands of documents — disclose strong serious points to be canvassed and that his team be given adequate opportunity to do a good job.

[2] To put it bluntly, the defence seeks an adjournment of these appeals for the simple reason that they are not prepared.

[3] The respondent's position is that the fixing of the dates of the appeals in August 2022 has been known since as far back as the case management on 8 April 2022 — which is some four months ago. Parties were then advised that the court would proceed on the dates fixed. The court's minutes of the case management on 8 April 2022 confirm this. Parties were therefore well aware that the court will proceed on those dates.

[4] The Federal Court Registry, issued a notice of hearing dated 29 April 2022 informing all parties that the hearing of the appeals is scheduled on 15 August 2022–26 August 2022. Therefore, any change in counsel was done with full knowledge of the dates that have been fixed for hearing.

[5] Then, on 26 July 2022, the court received a letter from the appellant's former solicitors, Messrs Shafee & Co stating that the appellant had discharged them as his solicitors on record. This is in encl 237. The former solicitors clearly indicated that the choice to discharge the former solicitors was the appellant's. Messrs Shafee & Co stated as follows:

> 2. Sila ambil perhatian bahawa pada 25 Julai 2022, jam lebih kurang 5.00 petang, *pihak kami telah menerima sesalinan surat dari Dato' Sri Mohd Najib Bin Hj Abd Razak ('Perayu')* yang mana Perayu telah memberhentikan (discharged) dengan serta merta Tetuan Shafee & Co. daripada bertindak sebagai kaunsel dan peguamcara yang mewakili beliau di dalam Rayuan-Rayuan Jenayah ini dan Prosiding-Prosiding berkenaan. Menerusi surat yang sama, Perayu telah

memaklumkan bahawa beliau telah melantik Tetuan Zaid Ibrahim Suffian TH Liew & Partners ('ZIST') sebagai peguamcara. (Emphasis added.)

[6] It is obvious that the appellant took it upon himself to discharge his solicitors to the present ones, Messrs Zaid Ibrahim Suflan TH Liew & Partners ('Messrs Zaid Ibrahim') who in turn appointed Tuan Hj Hisyam Teh as lead counsel.

[7] Messrs Zaid Ibrahim thereafter wrote to court vide a letter dated 26 July 2022 notifying and confirming the change of solicitors. Their letter is to be found in encl 239. In this letter, Messrs Zaid Ibrahim requested for an urgent case management and sought permission to participate in a case management that was already fixed on 29 July 2022. They also stated their intention to put on record their motion to adjourn for the reason that 'a wholly new team has taken over the conduct of the above matter'.

[8] The court's reply is to be found in encl 245 which contains a letter dated 28 July 2022 stating two things. Firstly, the deputy registrar of the Federal Court, Puan Wan Fatimah Zaharah bt Wan Yussof, confirmed the case management on 29 July 2022 and secondly, indicated the court's directions that the hearing of the appeals would proceed as scheduled on 15 August 2022–26 August 2022. In short, the court refused the adjournment.

[9] It is to be noted that despite having been discharged by the appellant on 25 July 2022, the appellant's former counsel Tan Sri Shafee Abdullah had nonetheless attended the case management on 29 July 2022. This is reflected in the court's minutes for case management on 29 July 2022.

[10] The case management minutes on 29 July 2022 also disclose that Tan Sri Shafee had advised the court that the digital copies of the records of appeal had been uploaded and shared with the new counsel, Messrs Zaid Ibrahim on 22 July 2022. This is despite discharge only having been effected subsequently on 25 July 2022.

[11] Finally, the minutes also state that the court reminded parties, no less than four times, that the appeals will proceed as scheduled notwithstanding the change in solicitors.

[12] It is against this backdrop that an adjournment is sought once again.

DECISION

The law on adjournments

[13] It is beyond settled that though the courts have absolute discretion to grant or refuse adjournments, such discretion must be exercised judiciously. What is judicious hinges on a proper and wholesome consideration of the facts and circumstances of the case before making a decision.

[14] In the context of this case, we accept unreservedly the notion that the right to a fair trial is part and parcel of the right to life and personal liberty guaranteed by art 5(1) of the Federal Constitution. See: *Yahya Hussein Mohsen Abdulrab v Public Prosecutor* [2021] 5 MLJ 811. The right of the accused to meaningful legal representation by counsel of his choosing is another important component of the right to a fair trial. This much is also apparent from art 5(3) of the Federal Constitution but we hasten to add that this right is not absolute.

[15] This leads us to the primary reason given by counsel for the appellant in favour of an adjournment which we stated earlier. In short, an adjournment ought to be granted because the new defence team needs adequate time to prepare. In the other words, they are not ready.

[16] We start by saying that we agree that in appropriate cases, where counsel is not ready to proceed for legitimate reasons, the court should be minded to adjourn a cause or matter. We do not think this is the case here.

[17] Firstly, from our narration of the procedural history on the fixing of these appeals, all parties to this matter, including the appellant, were well aware that the appeals had been fixed for hearing on 15–26 August 2022 since April 2022 and the request for an adjournment on the same ground had been refused.

[18] In this regard, we find r 6(a) of the Legal Profession (Practice and Etiquette) Rules 1978 ('the 1978 Rules') most relevant. It stipulates thus:

> *Rule 6 An advocate and solicitor not to accept brief if unable to appear.*
>
> (a) An advocate and solicitor shall not accept any brief unless he is reasonably certain of being able to appear and represent the client on the required day.

[19] Thus, where counsel has accepted a brief, he should be deemed as 'reasonably certain of being able to appear and represent the client on the required day'. The 1978 Rules also appear to recognise the general disposition of the courts in this country to disfavour adjournments unless cogent reasons are provided. The general rule is that counsel shall make every effort to be ready for trial (and we think by extension appeals) on the day fixed. See: r 24(a) and (b) of the 1978 Rules.

[20] The 1978 Rules are not, in a sense, binding on the courts. But they are nevertheless binding on members of the Bar who are obliged to comply with them. And, they are indicative of the fact that any disciplined lawyer such as the counsel for the appellant would not have accepted a brief with dates already fixed for hearing unless he was prepared.

[21] In fact, the appellant having been well aware of the dates fixed for hearing elected to discharge his former solicitors and appoint Messrs Zaid Ibrahim and Tuan Hj Hisyam Teh as his solicitors and counsel respectively. This is his right to do so but he cannot, after having made that decision, turn around and say that his new lawyers are not ready to proceed with the hearing of the appeals. The new lawyers too, having accepted the brief, are not entitled to say they need more time to prepare knowing fully well that the dates had been fixed well in advance.

[22] Given the circumstances we have outlined, the request for the adjournment and the grounds in support thereof are neither cogent nor reasonable.

[23] In this regard, we recall the following words of Harun J from *Public Prosecutor v Mohtar bin Abdul Latiff* [1980] 2 MLJ 51 at pp 51–52:

> In any criminal trial, there are three parties, the court, the prosecution and the defence. If dates of hearing are to be fixed at the convenience of all three parties, then trial dates will be fixed at some considerable time hence. There is of course no guarantee, as happened in this case, that the trial will go on as scheduled on the date fixed, if everyone's convenience is taken into account. The general rule, therefore, has always been that trial dates are fixed at the convenience of the court, on a first-come-first-served basis. This is fair to all concerned. Public funds are not wasted on idle courts when there is so much work to do.

[24] The stark reality is that considerable public funds would be wasted if granting an adjournment in a case of this kind was an easier option. Article 8 of the Federal Constitution and the Rule of Law demand that the appellant be treated just like any other accused. As such, we state again that while the appellant is entitled to his right to change his counsel, he is not entitled to make this choice at the expense of the court, the prosecution or the entire justice system.

[25] While on this subject, another very significant component of the right to a fair trial is that justice cannot be unduly delayed. In this regard, we remind ourselves of *Arahan Amalan Ketua Hakim Negara* No 2/2003 which states that cases of this nature must be prioritised.

[26] Further, the time taken on this case, especially the number of days fixed for hearing means many other criminal cases and accused persons have had to wait their turn for their appeals to be heard. Justice delayed in this case is also justice denied to other accused persons. In this regard we echo the following words of Richard Talalla J in *Lai Cheng Chong v Public Prosecutor* [1993] 3 MLJ 147 at p 151:

> At no time has it been truer to say that justice delayed is justice denied. It cannot be disputed that at this point of time, justice is so delayed in our courts as to amount to denial. There is a huge backlog of cases. Statistics indicate that a main cause for this unfortunate situation is adjournment and postponement of trials on the date appointed for trial, largely occasioned by counsel applying for the same on a variety of grounds, most of them avoidable if counsel's affairs were managed fairly and reasonably, bearing in mind counsel's duty not only to the client but also to the court and the public at large.

[27] For these reasons, the appellant's motion to adjourn and vacate these appeals for a period of at least three to four months is unanimously refused.

Application for adjournment refused.

Reported by Ashok Kumar